Supreme Court, U.S.
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Case No. _____

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1997

FLETCHER BRIAN TUKES,
Petitioner,

v.

HARRY K. SINGLETARY, JR.,
Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

PETITION FOR WRIT OF CERTIORARI

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52 pp.

A. QUESTIONS PRESENTED FOR REVIEW

1. Whether the voluntariness of a plea of guilty in a state court proceeding implicates a federal constitutional right upon which a certificate of appealability should be issued after denial in proceedings under 28 U.S.C. §2254?

B. PARTIES INVOLVED

The parties are identified in the caption.

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PETITION FOR WRIT OF CERTIORARI

The Petitioner respectfully prays the Court to issue its writ of certiorari to review the judgment of the United States Court of Appeals for the Eleventh Circuit entered in this case on 16 September 1997. (Appendix, pp. 1-2, hereinafter "A").

D. CITATIONS TO OPINIONS BELOW

The proceedings in the Eleventh Circuit Court of Appeals denied the motion for issuance of a certificate of appealability denied first by the district court judge in an opinion order (A 3-5) on 05 May 1997 and denied by the Court of Appeals by order on 16 September 1997.

E. JURISDICTION

The United States Court of Appeals for the Eleventh Circuit entered its order denying Petitioner's Motion for Issuance of Certificate of Appealability on 16 September 1997. (A 1-2). The jurisdiction of the Supreme Court of the United States is invoked pursuant to 28 U.S.C. §1254(1).

F. CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

1. Constitutional Provisions.

The Due Process Clause of the Fifth Amendment to the Constitution of the United States provides in pertinent part that:

> ...nor be deprived of life, liberty, or property, without due process of law;....

2. Statutory Provisions.

28 U.S.C. §2254(c)(1) provides:

> Unless a circuit justice or judge issues a certificate of appealability, an appeal may not

> be taken to the court of appeals from —
>
> (A) The final order in a habeas corpus proceeding in which the detention complained of arises out of process issued by a state court; or
>
> * * *
>
> (2) A certificate of appealability may issue under paragraph (1) only if the applicant has made a substantial showing of a denial of a constitutional right.

G. STATEMENT OF THE CASE

1. The Basis for Jurisdiction Below.

A Petition for Writ of Habeas Corpus by a Person in State Custody pursuant to 28 U.S.C. §2254 was filed on behalf of Mr. Tukes on 01 July 1994.

The district court entered an order denying the petition on 08 April 1997. (A 6-34). Petitioner filed a motion in the district court requesting a certificate of appealability pursuant to 28 U.S.C. §2253, which the district court denied on 05 May 1997. (A 3-5). Petitioner then sought a certificate of

appealability from the United States Court of Appeals for the Eleventh Circuit, which was denied on 16 September 1997. (A 1-2).

2. Facts Pertinent to the Questions Presented.

Fletcher Brian Tukes, the Petitioner, was charged in state court, the Fourth Judicial Circuit, Duval County, Florida, in a two-count indictment: Count I, second degree murder with a firearm [§782.04(2), Fla. Stat.]; Count II, possession or use of weapon [§775.087, Fla. Stat.]. Fred C. Gazaleh, Esquire, of Jacksonville, Florida, appeared for Mr. Tukes at plea and sentencing. Mr. Tukes plead guilty to Count I, second degree murder with a firearm; a nolle prosequi was entered for count II. On 30 August 1991, a judgment of conviction was entered against Mr. Tukes by the Honorable Peter L. Dearing, Fourth Judicial Circuit Court, Duval County, Florida. Mr. Tukes was subsequently sentenced to forty years imprisonment.

Mr. Tukes appealed the conviction to the District Court of Appeal, First Appellate District of Florida. The case was

dismissed on 07 January 1992. Mr. Tukes filed a motion for post-conviction relief pursuant to Fla. R. Crim. P. 3.850, raising the claim that the plea of guilty was involuntary and the plea colloquy was legally and constitutionally deficient. After evidentiary hearing, the state court denied the motion. The appeal of the denial of the 3.850 motion was affirmed by the First District Court of Appeal, on 29 October 1993.

Mr. Tukes then filed his federal habeas corpus petition. The petition alleged that Mr. Tukes' guilty plea was involuntary and that the plea colloquy was legally and constitutionally deficient. The petitioner specifically alleged that Mr. Tukes was 16 years old at the time of his arrest and 17 at the time of his plea. At the time of his plea, because of Mr. Tukes' youth and lack of education, he did not understand the proceedings to the level required by constitutional law. In particular, certain key words used in the plea agreement and plea colloquy were not understood by the youth. These terms were never explained to Mr. Tukes.

Because Mr. Tukes did not understand the technical terms used in the plea proceedings, the plea was not knowing, intelligent, free and voluntary.

3. Course of the Proceedings.

The petition was denied in federal court without an evidentiary hearing on 08 April 1997. In denying the petition, the district court cited to and relied on the state court plea form signed by Mr. Tukes. (A 6-34). The district court then cited to and relied on the portion of the plea colloquy where the defendant was questioned directly by the state court judge on whether Mr. Tukes had understood the negotiated sentence he was to receive. (A 20). The court also cited to the portion of the colloquy where Mr. Tukes was questioned on whether he was freely and voluntarily entering his plea. (A 21).

After discussing the standard of review in federal habeas corpus cases, the district court found that Mr. Tukes "understood charges against him, understood the consequences

of his plea, and voluntarily chose to plead guilty." (A 31). The district court found that the plea colloquy was sufficient. (A 33). In its order, the district court did not address the issue of Mr. Tukes' age, his lack of education, or his inability to define or explain many of the legal terms used in the plea agreement and during the plea colloquy.

Mr. Tukes sought the issuance of a certificate of appealability. Mr. Tukes argued that the facts surrounding his plea satisfied the requirements for issuance of a certificate of appealability because he made a substantial showing of the denial of a constitutional right. In its order denying the certificate, the district court held that Mr. Tukes did not meet the substantial showing of a denial of a constitutional right because Mr. Tukes did not " 'demonstrate that the issues are debatable among jurists of reason' or 'that a court could resolve the issues [differently].' " (A 4), citing, *Barefoot v. Estelle*, 463 U.S. 880, 893 n.4 (1983). The Eleventh Circuit

order also denied Mr. Tukes motion and relied on *Barefoot*. (A 1-2).

H. REASONS FOR GRANTING THE WRIT

It is respectfully submitted that the district court's reliance on a state court plea form to conclude that the Petitioner understood the consequences of the plea, without more, does not satisfy the requirement that the concomitant waiver of constitutional rights attendant to a guilty plea be free and voluntary. At the time of the plea, Mr. Tukes was 17 years old; at the time of his arrest he was sixteen. The judge found he had an eleventh grade education. Mr. Tukes had not completed the eleventh grade. This fact, in and of itself, is of little consequence, but it is indicative of the cursory review the case received.

The plea was a closed ended questioning by the state judge; "yes" or "no" answers only were required of the defendant. The judge relied on the plea form to find the plea

was free and voluntary, but he never addressed the evidence that the plea form contained a series of vocabulary words of which Mr. Tukes had no understanding.

QUESTION	ANSWER
Mitigation[1]	I don't know
Essential[2]	I don't know
Free and voluntary[3]	Not sure
Minimum mandatory[4]	Means I get 20 days a month
Nol prossed[5]	First I heard of that
Negotiated sentence[6]	Don't know

---

[1]Plea form.

[2]Plea form and sentencing transcript, p. 7.

[3]Plea form and sentencing transcript, p. 8, sentencing transcript, p. 10.

[4]Plea form and sentencing transcript, p. 7.

[5]Plea form.

[6]Plea form and sentencing transcript, p. 7.

Disposition[7]	Something you take
Lesser included offense[8]	Lesser charge
Negotiated[9]	Talk over
Confront[10]	First I heard of that
Alternatives[11]	Something other than the other

As the state court system transforms from processing individuals to processing cases, most of which by pleas of guilty or nolo contendere, it is important to the finality of the process that the case be closed with the minimum assurance that due process has been meted out. Knowledge, and ignorance, are core concerns in the guilty plea proceeding.

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[7]Sentencing transcript, p. 6, sentencing transcript, p.8.

[8]Sentencing transcript, p. 7-8.

[9]Sentencing transcript, p. 8.

[10]Sentencing transcript, p. 9.

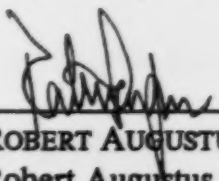
[11]Sentencing transcript, p. 9.

Boykin v. Alabama, 395 U.S. 238, 242-3; 89 S.Ct. 1709, 1712; 23 L.Ed.2d 274 (1969). It is submitted that minimum due process in the state court proceeding, like guilty plea proceedings in federal court, requires the presiding judge to address the defendant personally and make an adequate record, not by taking the defendant through a ninety second barrage of leading questions, but by personally addressing the youth and requiring him to put into his own words his understanding, or lack of understanding, of the proceedings. The procedure will eliminate the marginal guilty plea attacks; the procedure will avoid those petitions prepared on behalf of the confused. The integrity of the guilty plea process will be restored as defendants are humanized, and individualized, and personally involved in the process, like federal court.

I. CONCLUSION

The petition for writ of certiorari should be granted, and that relief is hereby requested.

Respectfully Submitted,



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APPENDIX TO
PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

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IN THE UNITED STATES COURT OF APPEALS

FOR THE ELEVENTH CIRCUIT

No. 97-2606

FLETCHER BRIAN TUKES,

Petitioner-Appellant,

versus

HARRY SINGLETARY, JR.,
Secretary, Department of
Corrections, State of Florida,

Respondent-Appellee.

Appeal from the United States District Court for the
Middle District of Florida

ORDER:

Because appellant has failed to make a substantial showing of the denial of a federal right, his motion for a certificate of probable cause is DENIED. See Barefoot v.

Estelle, 464 U.S. 874, 104 S.Ct. 209, 78 L.Ed.2d 185 (1983).

/s/ Stanley F. Birch, Jr.
UNITED STATES CIRCUIT JUDGE

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CLERK, U.S. DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
JACKSONVILLE, FLORIDA

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
JACKSONVILLE DIVISION

FLETCHER BRIAN TUKES,

Petitioner,

vs. Case No. 94-670-Civ-J-20B

HARRY K. SINGLETARY, JR., etc.; et al.

Respondents.

ORDER

This cause is before the Court on Petitioner's Motion for Issuance of Certificate of Appealability (Doc. #17). On April 24, 1996, the President signed into law amendments to 28 U.S.C. §§ 2244, 2253, 2254, 2255, Appellate Rule 22, and 21 U.S.C. § 848 (q). As a result, this Court should grant an

application for certificate of appealability only if the Petitioner makes a substantial showing of the denial of a constitutional right. To make this substantial showing, Petitioner "must demonstrate that the issues are debatable among jurists of reason" or "that a court could resolve the issues [differently]." Barefoot v. Estelle, 463 U.S. 880, 893 n.4 (1983) (citation omitted). In addition, Petitioner could show "the questions are adequate to deserve encouragement to proceed further." Id. Petitioner meets none of the formulations. The requirement of a certificate of appealability was meant to prevent this type of petition from proceeding any further.

Therefore, it is now

ORDERED:

1. Petitioner's April 28, 1997, Motion for Issuance of Certificate of Appealability (Doc. #17) is **DENIED.**

2. Petitioner's April 28, 1997, Motion for Leave of Court to File Attached Notice of Appeal Upon Issuance of Certificate of Appealability (Doc. #18) is **DENIED AS MOOT**.

DONE AND ORDERED at Jacksonville, Florida, this

5th day of May, 1997.

/s/ Harvey S. Schlesinger
UNITED STATES DISTRICT JUDGE

sa 5/1
c:
Robert Augustus Harper, Esquire
Ass't Attorney General (David)
USCA

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CLERK, U.S. DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
JACKSONVILLE, FLORIDA

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
JACKSONVILLE DIVISION

FLETCHER BRIAN TUKES,

Petitioner,

vs. Case No. 94-670-Civ-J-20B

HARRY K. SINGLETARY, JR., etc.; et al.,

Respondents.

ORDER

I. Status

Petitioner Fletcher Brian Tukes filed a Petition for Writ of Habeas Corpus (Doc. #1) (hereinafter Petition). Two grounds are alleged in challenging his conviction for second degree murder with a firearm: (1) his guilty plea was not

entered voluntarily and intelligently because, due to his age and lack of education, Petitioner did not understand the proceedings; and, (2) the plea colloquy was legally and constitutionally deficient because the charges were not read or explained to him and the sentencing range was not explained to him by the trial court.

In his Memorandum of Law and Fact in Support of Petition for Writ of Habeas Corpus by Person in State Custody (Doc. #2) (hereinafter Memorandum), Petitioner asserts that due to his age and lack of education, he did not understand some of the technical terms in the plea agreement and the colloquy of the plea proceedings, and due to the omissions of the trial court, the trial judge never personally explained the elements of the second degree murder charge or informed Petitioner of the maximum punishment allowed by law.

Respondent filed a Response (Doc. #8) seeking the

denial of the Petition. Petitioner's Reply to State's Response to Petition for Writ of Habeas Corpus (Doc. #9) was filed thereafter. Respondent objected to the reply and filed a motion to strike asserting Petitioner, for the very first time, was attempting to raise an issue based on the Florida Youthful Offender Act. Petitioner responded explaining he was not attempting to add a new issue. The Court denied the objection and motion to strike based on Petitioner's notification that he abandoned any intent to raise a new claim concerning the Youthful Offender Act.

II. Procedural History

Petitioner was charged with first degree murder.[12] (App. F at 23). He pled guilty to the lesser included charge of second degree murder with a firearm on August 30, 1991.

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[12] (App. A), (App. B), (App. C), etc., hereinafter refers to the Respondent's Appendices (Doc. #8) filed October 17, 1994.

(App. F at 22). Pursuant to a negotiated plea agreement, he was adjudicated guilty to second degree murder, the state waived the three year minimum mandatory requirement for the firearm, he was sentenced to forty years, and Count II was nol prossed. (App. C; App. F at 22-23). Petitioner agreed to a sentence above the guidelines in exchange for a plea to the lesser offense. (App. C).

Petitioner appealed the conviction and sentence to the First District Court of Appeal (App. D); however, the appeal was dismissed for failure to timely file the notice of appeal. (App. E).

On January 15, 1993, Petitioner, through counsel, filed a Motion for Post Conviction Relief pursuant to Rule 3.850 of the Florida Rules of Criminal Procedure raising two claims: (1) the plea of guilty was involuntary; and, (2) the plea colloquy was legally and constitutionally deficient. (App. F, Motion for Post Conviction Relief). The circuit court, on

May 4, 1993, entered an Order Denying Defendant's Motion for Post Conviction Relief finding:

> As a basis for relief, Defendant alleges first, that his guilty plea was involuntary due to his age (17) and alleged lack of understanding of certain technical terms, and, second, that the plea colloquy was legally and constitutionally deficient because the trial judge did not "personally" inform the Defendant of the nature of the charge or the penalties provided by law.
>
> Such contentions are refuted by the record as reflected by the transcript of the Plea proceedings held on August 30, 1991, attached hereto as Exhibit "A". A review of such transcript shows that the purpose of the requirement (that Defendant understand the nature of the charge and the consequences of his plea) was accomplished by the trial judge. Furthermore, as in Bryant v. State, 373 So.2d 380 (Fla. 1st DCA 1979), the "trial judge was in as good a

position as anyone could be at the time of entry of the plea to determine defendant's mental capacity and ability to understand the nature and seriousness of his plea of guilty. This is particularly so in view of the fact that defendant's mother was present and questioned regarding the plea... ." (See Exhibit "A", at 10 for questions directed by the court to the Defendant's mother, Ms. Brown.)

The transcript further reflects that the trial judge took into consideration the Defendant's age, education, and understanding of the charges and consequences of the plea, so that this could hardly be said to be a rushed or superficial proceedings. Id. at 382; See also Exhibit "A", at pp. 6-9. Unlike the federal cases cited by Defendant in his Memorandum of Law, the trial judge here directly and "personally addressed" the Defendant for all intents and purposes of Fla.R.Crim.P. 3.172 and pursuant to Bryant v. State, supra and Williams v.

State, supra.

(App. F, Order Denying Defendant's Motion for Post Conviction Relief) (footnote omitted).

Petitioner appealed the denial of the motion (App. F, Notice of Appeal), and the decision was per curium affirmed on October 29, 1993, by the First District Court of Appeal. (App. G).

III. Exhaustion/Evidentiary Hearing

Respondents concede that Petitioner has exhausted his state court remedies. Response at 3. The Court will address the merits of both claims.

The Court has carefully reviewed the record and, for the reasons set forth more fully below, concludes Petitioner is not entitled to an evidentiary hearing. See Smelcher v. Attorney General of Alabama, 947 F.2d 1472, 1478 (11th Cir. 1991).

IV. Involuntary Plea

In support of his claim that his plea was not voluntarily and intelligently entered, Petitioner contends he did not understand some of the technical terms used in the plea proceedings due to his age and low level of education. Memorandum at 1-2. He also claims the trial judge did not personally inform him of the nature of the charge to which he was pleading or the penalties provided by law. Id. at 3-7.

The Plea of Guilty and Negotiated Sentence-Form 2, reads, in pertinent part, as follows:

> I hereby enter my plea of guilty for the reason that it is in my best interest. Before entering such plea of guilty, I was advised of the nature of the charge against me, the statutory offenses included within such charge, the range of allowable punishments thereunder, the possible defenses to the charge and circumstances in mitigation thereof, and all other facts essential to a broad understanding of the charge against me.

1. FREE AND VOLUNTARY NEGOTIATED SENTENCE

My attorney, the prosecutor, and I have negotiated my sentence in this case in that the prosecutor will recommend to the Judge of this Court that I be sentenced to: (please print)

P.G. to lesser included 2o Murder. The state waives the 3 yr. minimum mandatory for the firearm. Adjudicated Guilty. Sentenced to 40 years F.S.P. Ct. 2 will be nol prossed.

[Defendant] agrees to a sentence above the guidelines in exchange for a plea to the lesser offense.

I consider this negotiated sentence to be to my advantage, and I have freely and voluntarily entered my plea of guilty. I have not been offered any hope of reward, better treatment, or certain type of sentence to get me to plead guilty - other than the sentence set forth above - nor have I

been threatened, coerced, or intimidated in any way to get me to plead guilty.

2. ADVISED OF RIGHTS

I understand that by pleading guilty I give up the constitutional right of trial by the Judge or jury, the right to remain silent, the right to put on witnesses in my own behalf, the right to confront the witnesses against me, the right to have the State prove its case against me, and on the charge to which I am pleading guilty, I give up the right against self-incrimination, and

3. DISCUSSION WITH ATTORNEY

Before I plead guilty, my attorney and I have fully discussed all aspects of this case. He thoroughly explained the charges against me, my constitutional rights and answered all of my questions. My attorney and I have read this plea of guilty form together in private - and he explained all parts of it to my complete

understanding. I am satisfied with the services of attorney in this case.

4 READ AND EXPLAINED BY JUDGE IN OPEN COURT

The Judge of this Court read this plea of guilty form to me in Open Court. He explained ito [sic] to me and asked me if I understood it and if I wanted to plead guilty and give up these rights. I told the judge that I understood it, understood my rights and wanted to plead guilty to this charge.

5. TIME FOR CONSIDERATION AND REFLECTION

I have had sufficient time to consider the charge against me, the possible defenses, the advice of my attorney, the waiver of constitutional rights by entering my plea of guilty, and to reflect upon the consequences of my plea. The Judge of this Court has advised me that I may have additional time to consider all of these matters if I wanted

more time for such consideration. I have advised him that I did not need or desire more time and that I wanted to proceed with my guilty plea at this time.

6. NOT UNDER INFLUENCE OF ANY SUBSTANCE OR CONDITION

I am not under the influence of any drug or substance or condition which interferes with my understanding and appreciation of this plea and the consequences of it.

7. PLEA TRUE AND CORRECT AND UNDERSTOOD

I understood this plea of guilty form when my attorney read and explained it to me, I understood it when the Judge read and explained it to me, and it is true and correct.

Both my attorney and I have signed this statement of guilty plea and explanation of my rights in Open Court, at

> Jacksonville, Duval County,
> Florida, on August 30, 1991.

(App. C).

The agreement, dated August 30, 1991, is signed by the Assistant State Attorney, Petitioner, the Attorney for Defendant, the Deputy Clerk of Court and the Circuit Judge. Id. Underneath the signature of the circuit judge it states:

> My signature as Judge of this Court is certification that I have gone over this plea form with defendant in open court and have asked (him/her) questions, heard his responses and observed (his/her) demeanor. I find that he has the intelligence to understand (his/her) constitutional rights, his plea, the plea form, and these proceedings. I further find that the plea has been entered voluntarily and freely and that the defendant is not under the influence of any medication, drug, substance or condition that would interfere with (hisher) understanding and appreciation of the plea and the consequences of it.

Id.

At the plea hearing conducted on August 30, 1991, Petitioner, defense counsel, and the prosecutor were before the court. (App. F, Plea Proceedings). After stating Petitioner was a juvenile and bringing Petitioner's mother forward and having her state her name and relationship for the record, counsel stated:

> MR. GAZALEH: At this time my client has authorized me to enter a plea of guilty to number -- to withdraw his previous plea and enter a plea of guilty to the lesser included charge of second degree murder.
>
> That's done with the understanding that the State waives the three year minimum mandatory. And that my client will be sentenced to 40 years Florida State Prison. And the State will nolle pros Count Two. And also included in the plea form, the sentence is stipulated to be above the guidelines. And the State will

> not pursue the first degree murder charge.
>
> And that this is being done because my client feels it is in his best interest.

Id. at 22-23.

At that point, Petitioner was sworn in and the court questioned Petitioner in detail about the right to a separate hearing on the propriety of adult sanctions. Id. at 24. After discussing the matter with counsel, Petitioner responded that he was willing to waive the separate hearing and the written order. Id. at 2-45. Petitioner's mother also responded that she understood what was being waived and it was in her son's best interest to do so. Id. at 25. The state also waived the hearing and order. Id.

Petitioner responded in the affirmative that he had read and understood everything on the plea form, that it was his signature on the back of the plea form, and that the form was true and correct. Id. at 25-26. Petitioner's mother stated she

had spoken with the attorney about the plea. Id. at 26.

At that point, the court began to inquire about Petitioner's understanding of the plea agreement. Id. at 26. When asked how far he went in school, he responded the 11th grade. Id. Petitioner responded in the affirmative that he was able to read and understand English. Id. The judge specifically asked if there was anything on the form that he had any questions about, and Petitioner responded no. Id. Petitioner responded affirmatively that he was pleading guilty because he believed the disposition was in his best interest. Id.

With regard to the nature of the charges, the following exchange took place:

> THE COURT: Have you been advised of the nature of the charges against you? That is, the charges that appear in the two count indictment?
>
> THE DEFENDANT: Yes, sir.

THE COURT: Have you had explained to you what the maximum penalty is that could be imposed for these charges?

THE DEFENDANT: Yes, sir.

THE COURT: And just for the record, would the State advise what the maximum penalty is?

MR. JONES: Your Honor, this is a second degree murder with a firearm which makes it a life felony.

THE COURT: Have you been told what the range of allowable punishment is?

THE DEFENDANT: Yes, sir.

THE COURT: Have you and your attorney discussed, to your satisfaction, the possible defenses to the charge and any circumstances in mitigation to these charges?

THE DEFENDANT: Yes, sir.

THE COURT: And do you believe you have discussed with him and are satisfied that you

understand all the facts essential to a broad understanding of these charges?

THE DEFENDANT:
Yes, sir.

THE COURT: I have been told your attorney and the prosecutor have negotiated a sentence and that sentence is that you would be committed to the Department of Corrections for a period of 40 years. And that the State will waive a three year minimum mandatory sentence pursuant to 775.087 of the Florida Statutes. This would be to the lesser included offense in Count One of second degree murder. Count Two would be dismissed. And that you are agreeing to this sentence which exceeds the guidelines in exchange for the lesser offense of second degree murder; is all of that true?

THE DEFENDANT: Yes, sir.

THE COURT: Is that what you understand to be the disposition that's been negotiated between your attorney and the State?

THE DEFENDANT: Yes, sir.

Id. at 26-28.

With regard to the voluntariness of the plea, the trial court inquired:

> THE COURT: Okay. And are you pleading guilty because you believe this disposition of your case is in your best interest?
>
> THE DEFENDANT: Yes, sir.
>
> THE COURT: Are you freely and voluntarily entering this plea?
>
> THE DEFENDANT: Yes, sir.
>
> THE COURT: Has there been any promises made to you of any other type of reward or better treatment or certain type of sentence to get you to plead guilty, other than the sentence that's outlined on this form?
>
> THE DEFENDANT: No, sir.
>
> THE COURT: Have you been threatened or coerced or intimidated to have you enter

this plea?

THE DEFENDANT: No.

Id. at 28-29.

Petitioner confirmed that he understood the rights he was giving up by pleading guilty. Id. at 29. He confirmed that he had had enough time to confer with counsel about all of the alternatives, and he indicated he did not need additional time to speak with his attorney. Id. Finally, he acknowledged that he was satisfied with his attorney's representation. Id. at 29-30.

Petitioner confirmed he was not under the influence of intoxicating substances, and in his own mind, his plea was freely and voluntarily entered. Id. at 30. Moreover, the Court asked his mother if she believed her son understood what was going on and was entering his plea freely and voluntarily. Id. She responded in the affirmative. Id. After the state made a brief statement as to the factual basis for the

case, defense counsel stipulated to the factual basis for the purpose of the plea. Id. at 30-31.

At that time, the court accepted the plea finding: "the plea of guilty to the lesser included offense of second degree murder is freely and voluntarily entered with a full understanding of the consequences of that plea." Id. at 31. The court ratified the plea agreement, adjudicated Petitioner guilty of the offense of second degree murder, and sentenced him to 40 years in the Florida Department of Corrections (with no required minimum mandatory sentence). Id.

The purpose of a federal habeas proceeding is review of the lawfulness of Petitioner's custody to determine whether that custody is in violation of the Constitution of laws or treaties of the United States. Coleman v. Thompson, 501 U.S. 722 (1991). A federal habeas court reviews a state court guilty plea only for compliance with such constitutional protections. The Eleventh Circuit explained in Jones v.

White, 922 F.2d 1548, 1556-57 (11th Cir.), cert. denied, 510 U.S. 967 (1993):

> This court has concluded that "[a] reviewing federal court may set aside a state court guilty plea only for failure to satisfy due process: If a defendant understands the charges against him, understands the consequences of a guilty plea, and voluntarily chooses to plead guilty, without being coerced to do so, the guilty plea...will be upheld on federal review." Stano v. Dugger, 921 F.2d 1125, 1141 (11th Cir.) (en banc), cert. denied, --U.S.--, 112 S.Ct. 116, 116 L.Ed.2d 85 (1991).

Thus, in order for a guilty plea to be constitutionally valid, it must be made knowingly, intelligently, and voluntarily. Pardue v. Burton, 26 F.3d 1093, 1096 (11th cir. 1994).

As explained by the Eleventh Circuit:

> A guilty plea is an admission of criminal conduct as well as the waiver of the right to trial. Brady v. United States, 397

U.S. 742, 748, 90 S.Ct. 1463, 1469, 25 L.Ed.2d 747 (1970). "Waivers of constitutional rights not only must be voluntary but must be knowing, intelligent acts done with sufficient awareness of the relevant circumstances and likely consequences." Id.; United States v. Fairchild, 803 F.2d 1121, 1123 (11th Cir. 1986) (per curiam).

Reviewing federal courts "may set aside a state court guilty plea only for failure to satisfy due process. Stano v. Dugger, 921 F.2d 1125, 1141 (11th Cir.) (en banc), cert. denied, 502 U.S. 835, 112 S.Ct. 116, 116 L.Ed.2d 85 (1991). "[W]hen it develops that the defendant was not fairly apprised of its consequences" or when "the defendant pleads guilty on a false premise" in the prosecution's plea agreement, a guilty plea violates the Due Process Clause. Mabry v. Johnson, 467 U.S. 504, 509, 104 S.Ct. 2543, 2547, 81 L.Ed.2d 437 (1984). The Court has instructed that the "essence" of any promises that

induce a guilty plea "must in some way be made known" to the defendant. Santobello v. New York, 404 U.S. 257, 261-62, 92 S.Ct. 495, 498, 30 L.Ed.2d 427 (1971).

For a guilty plea to be entered knowingly and intelligently, " 'the defendant must have not only the mental competence to understand and appreciate the nature and consequences of his plea but he also must be reasonably informed of the nature of the charges against him, the factual basis underlying those charges, and the legal options and alternative that are available.' " Stano, 921 F.2d at 1142 (citation omitted) (emphasis added). Voluntariness implicates "[i]gnorance, incomprehension," and "inducements" as well as "coercion, terror" and "threats." Boykin v. Alabama, 395 U.S. 238, 242-43, 89 S.Ct. 1709, 1712, 23 L.Ed.2d 274 (1969); Stano, 921 F.2d at 1141. Thus, "[i]gnorance of the consequences of a guilty plea may require its rejection."

> Stano, 921 F.2d at 1141 (citing Boykin, 395 U.S. at 243-44, 89 S.Ct. at 1712).

Finch v. Vaughn, 67 F.3d 909, 914-15 (11th Cir. 1995).

Further, there is no requirement that the state courts adhere rigidly to the requirements of Rule 11 of the Federal Rules of Criminal Procedure governing acceptance of pleas in federal courts. See Owens v. Wainwright, 698 F.2d 1111, 1113 (11th Cir.) (citing Frank v. Blackburn, 646 F.2d 873, 882 (5th Cir. 1980), modified on other grounds, 646 F.2d 902 (5th Cir.), cert. denied, 454 U.S. 840 (1981)), cert. denied, 464 U.S. 834 (1983).

Although the state trial court made a post-conviction finding that Petitioner's plea was entered voluntarily and intelligently (App. F, Order Denying Defendant's Motion for Post Conviction Relief); no hearing had been conducted. Therefore, the factual findings are not entitled to a presumption of correctness in this habeas proceeding, and a

federal court reviews the matter de novo. Stokes v. Singletary, 952 F.2d 1567, 1572 n. 8 (11th Cir. 1992).

Although defendant's statements during the plea colloquy are not insurmountable, the Supreme Court held in Blackledge v. Allison, 431 U.S. 63, 73-74 (1977), that "the representations of the defendant [at a plea hearing], as well as any findings made by the judge accepting the plea, constitute a formidable barrier in any subsequent collateral proceedings. Solemn declarations in open court carry a strong presumption of verity."

It is clear from the record that Petitioner understood the charges against him, understood the consequences of his plea, and voluntarily chose to plead guilty. The plea agreement was signed by Petitioner, his counsel, the prosecutor, and the judge. Petitioner's counsel verbally reiterated the plea agreement during the plea proceedings. Thus, Petitioner heard the plea agreement in open court.

Petitioner was accurately advised of the punishment he would receive. There were no surprises after the plea colloquy.

The constitutional requirements for a valid guilty plea do not require that a defendant be advised of the actual length of his incarceration. Rather, a defendant must be advised of the maximum possible penalty, including any mandatory minimum penalty. It is the possible maximum exposure that must be conveyed to a defendant during the plea colloquy, not a prediction of the actual sentence. Any contention to the contrary has been consistently rejected. See Hill v. Lockhart, 474 U.S. 52, 56 (1985); Owens v. Wainwright, 698 F.2d at 1113.

Here, the guilty plea form clearly stated Petitioner would be sentenced to serve 40 years in prison with no three year minimum mandatory for the use of a firearm. Petitioner received the benefit of the bargain. He avoided punishment for first degree murder. Additionally, the state agreed to nolle

prosequi the second count of the information. Petitioner was not mistakenly led to believe that this plea would benefit him; it did benefit him. See Long v. United States, 883 F.2d 966 (11th Cir. 1989)(per curiam); Czere v. Butler, 833 F.2d 59 (5th Cir. 1987). There is no constitutional requirement that the plea be a "smart" decision, only that it not violate due process. Stano v. Dugger, 921 F.2d 1125, 1142 (11th Cir.) (en banc), cert. denied, 502 U.S. 835 (1991).

The "essence" of the bargain was clearly explained to Petitioner. The record reflects he fully understood the plea and the sentence he would receive. Here there was no ignorance of the consequences of the plea bargain. Petitioner was accurately and completely advised of the nature of the charge and the penalties provided by law. Petitioner received all the process to which he was entitled under the Constitution of the United States.

Therefore, it is now

ORDERED:

1. Respondent's Response (Docs. #8), requesting the Petition be denied, is **GRANTED**, and judgment shall be entered in favor of the Respondent.

2. The Petition for WRIT of Habeas Corpus is hereby **DENIED**.

3. The Clerk of the Court shall enter judgment accordingly and close this case.

DONE AND ORDERED at Jacksonville, Florida, this 8th day of April, 1997.

/s/ Harvey S. Schlesinger
UNITED STATES DISTRICT JUDGE

sa 4/7
c:
Robert Augustus Harper, Esquire
Ass't Attorney General (David)